In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-324

RUSSELL L. CARTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of having willfully attempted to evade his income taxes for the years 1963, 1964, and 1965, in violation of 26 U.S.C. 7201. He was sentenced to imprisonment for a term of twelve months, with sentence to be suspended upon payment of $12,000 in fines. The court of appeals affirmed (Pet. App. 18-27).

1. In proving tax evasion, the government used the "net worth" method. As the court below noted, however, this approach was strongly corroborated by other direct evidence. Thus, the government's proof at trial included a showing of 33 specific items of omitted income during the three prosecution years: 10 items in 1963, totalling $2,793.83; 13 items in 1964, totalling $2,982.81; and 10 items in 1965, totalling $2,596.47 (App. 199-207).[1]

The proof of petitioner's net worth and expenditures established that petitioner's total unreported taxable income for the prosecution years exceeded $80,000 (Gov't. Ex. 9; Pet. App. 20). Petitioner stipulated at trial that the government's computations, which included savings accounts in excess of $90,000, were accurate except for the omission of a large cash hoard petitioner claimed he had held in safety deposit boxes and in an office safe at the outset of the years in question (Tr. 87-112; App. 199-207).

In determining petitioner's net worth as of December 31, 1962 (*i.e.*, immediately prior to the prosecution years), the government had used a figure of $1,000 for "cash on hand"; this estimate was based on petitioner's own statement concerning the amount of cash he ordinarily kept on hand (Tr. 188; App. 96). However, shortly before trial petitioner claimed that he had possessed a cash hoard of $42,000 at the end of 1962 (App. 90-91). After seeing the government's

[1] "App." refers to the separately bound appendix in the court of appeals. "Tr." refers to the court reporter's transcript of testimony at trial.

determination of his total unreported taxable income, petitioner claimed at trial that his cash hoard had in fact been $70,000 (Tr. 382). However, petitioner did not account for the source of these alleged funds; revenue agents followed leads suggested by petitioner, but they were unable to verify the existence of any cash hoard as of December 31, 1962 (App. 93).

Despite petitioner's assertions, the government's evidence did negate any real possibility that the increase in his apparent net worth from 1963 through 1965 was the result of dipping into a previously amassed cash hoard, rather than the result of unreported income during those years. First, the government established at trial that petitioner's financial history made it highly unlikely that he could have accumulated large amounts of hidden monies in addition to his substantial savings accounts, prior to the prosecution years. Petitioner completed his education in 1947, when he graduated from law school; during the years 1949-1953 he was employed as an assistant county prosecutor, at an annual salary of between $4,000 and $6,000 (Tr. 333; App. 137, 156). He was engaged in the private practice of law from 1953 until 1959 (Tr. 294); he destroyed his books and records for those years (and for all other years prior to the prosecution years) after the beginning of the investigation leading to his indictment (App. 73-82). In 1959 he was appointed Budget Director for the State of Ohio, a position he held until 1962 (App. 123). Second, petitioner's prior reports of his income did not suggest that he was able to salt away a cash hoard in addi-

tion to the nearly $100,000 in cash and securities the government's schedule gave him credit for having at the beginning of the prosecution years. His returns showed adjusted gross incomes of approximately $16,300 in 1959, $21,250 in 1960, $19,350 in 1961, and $14,000 in 1962 (App. 195). And although petitioner testified at trial, he made no attempt to introduce evidence of prior earnings in order to support his claim that he possessed a substantial cash hoard (Tr. 532, 535; App. 155, 159).

Third, there was also evidence that petitioner had borrowed relatively small amounts of cash from lending agencies in the years immediately preceding the years in question (Tr. 424-425; App. 203), and that in October 1962 he had withdrawn funds from his savings accounts and deposited them in checking accounts (Tr. 211-212). These transactions were certainly inconsistent with maintenance of large amounts of pre-1963 cash in safety deposit boxes. Fourth, certain purchases petitioner had claimed were made out of the alleged cash hoard were shown in fact to have been made with funds withdrawn from his savings accounts and with a check drawn on a client's account (App. 194; Gov't. Ex. 79), and, contrary to petitioner's claim at trial, deposits to his savings accounts could not have been made directly from funds allegedly stashed in his safety deposit box (Gov't. Ex. 75).

2. Petitioner contends (Pet. 7-17) that there was insufficient evidence to go to the jury on the question of his net worth, arguing that the decision below re-

jecting this claim is in conflict with this Court's decision in *Holland* v. *United States*, 348 U.S. 121, and with decisions of the Fifth Circuit. However, this case presents no such conflict and warrants no further review, since what is really in issue is the sufficiency of the evidence.

In *Holland* v. *United States*, *supra*, this Court upheld a conviction in a tax prosecution based solely on proof of net worth and expenditures. In doing so the Court emphasized that "an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets" (348 U.S. at 132). This admonition was directed to both juries and judges: the trial court, viewing the evidence in the light most favorable to the government, must determine whether reasonable men could find beyond a reasonable doubt that opening net worth was established with reasonable certainty; the jury must make the final determination of whether the opening net worth was so established. See 348 U.S. at 129, 140; Pet. App. 21-22. The court below reviewed the trial judge's charge to the jury and correctly concluded that "he followed the principles of *Holland* with both care and understanding" (Pet. App. 22). Petitioner's argument here is in essence simply that the case should not have gone to the jury because reasonable men could not have found, beyond a reasonable doubt, that the government had established the amount of his cash on hand on December 31, 1962, with reasonable certainty, and that

therefore the standard established by *Holland* was not met. But the evidence summarized above constituted an adequate basis for the jury's inference that the government's estimate of petitioner's opening cash on hand was accurate.[3]

Petitioner claims that the decision below represents a more lenient standard of sufficiency of proof than has been imposed by the Fifth Circuit in *Bryan* v. *United States*, 175 F. 2d 223, and *Dupree* v. *United States*, 218 F. 2d 781. But those cases merely turn on their own facts, as does the present case. They do not establish any conflict over the legal standard of proof or the scope of review to be applied in net worth cases. In *Bryan* the court relied heavily on the fact that there was no basis in financial statements, in records of the defendant, or in his admissions before trial, for the government's figures (175 F. 2d at 225), whereas here there was ample documentary support for all asset values except that of cash on hand, and petitioner himself had pegged the latter at $1,000 in his discussions with investigating agents. Similarly, in *Dupree* the government had not even purported to establish the opening net worth or

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[3] Although petitioner now suggests (Pet. 3, 5-6, 13) that his claim of a $70,000 cash hoard was corroborated by a showing of substantial cash expenditures during the prosecution years and of a $17,000 cash hoard after the close of those years, those facts do not explain the source, or establish the existence, of an *earlier* store of cash. On the contrary, without any other reason to suspect that petitioner did have a pre-1963 cash hoard, these items tend to corroborate the substantial underreporting of income in the years 1963-1965 charged in the indictment.

available funds (218 F. 2d at 785); the proof offered there fell far short of that made here.[3] It is hardly surprising that, in reviewing the sufficiency of the evidence, courts of appeals applying the same standards of review reach different results in different cases.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[3] See also *United States* v. *Fenwick*, 177 F. 2d 488, 491 (C.A. 7) (counsel for the government admitted at trial that the proof of net worth was inadequate).

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